87-285

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1987

GLADYS M. DOWELL for
DYER P. DOWELL, deceased

PLAINTIFF-APPELLANT.

V.

OTIS R. BOWMAN, M.D.
SECRETARY HEALTH AND
HUMAN SERVICES

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS, SIXTH CIRCUIT, OHIO; ON
WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE UNITED STATES

BRIEF FROM RESPONDENT PETITIONER PRO-SE

MRS. GLADYS M. DOWELL
6200 TAYWOOD, APT. H
ENGLEWOOD, OHIO 45322

JUNE 15, 1987

QUESTIONS PRESENTED

(1) Is our Judicial System adequately prepared to judge all Social Security disability cases that go before a district court for judgement?

(2) What is more important: justice, or the rule used to determine what it must be?

(3) If there is a need for justice and the law used is inadequate to supply the need, would not the law dictate an injustice to be made?

(4) Does the rule 42 U.S.C. 405(g) give the Secretary full authority to choose the lesser important disability evidence to make a decision on, when the evidence eliminated can prove disability?

(5) Shouldn't we consider, what must stand in any case is justice if it is to prevail, regardless of court proceedings,

requirements and rules set forth by law to determine a case.

(6) Did the need for justice come first?

(7) Does law provide Social Security with rules that permit them to violate a citizen's signature rights, without informing them so they can protect themselves against such action?

(8) Does law consider the effects this action would have on a citizen's family, in the event of their death?

(9) Does law give Social Security full authority to decide for any applicant what claim of a disability they can make and cannot consider any other, before the claim is examined?

(10) Can Social Security now decide to take the word of an applicant, even though believed, over his doctor's word if doubt is apparent at the time the application is

filed?

(11) Can the effects of such a decision by Social Security, if legal, justify denying disability benefits because of a citizen's death, and not because of failure to be informed properly to resolve a situation satisfactorily while they are living?

(12) Shouldn't my husband, by the Secretary, been considered an exception to the rule, rather than an example of it, since his rights were denied him before the Secretary received this case?

(13) Wouldn't this consideration given my husband a chance to have his disability considered on it's own merit, rather than by the ruling on Judicial review?

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IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM 1987

GLADYS M. DOWELL for
DYER P. DOWELL (deceased)

PLAINTIFF - APPELLANT,

V.

OTIS R. BOWMAN, M.D.
Secretary of Health and
Human Services

Defendant - Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT, OHIO; ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

OPINION BELOW

The United States Court of Appeals did not make a decision on the application my husband filed with Social Security on his disability, October 2, 1979.

The Sixth Circuit Court issued their decision April 14, 1987 denying disability

benefits. Case Docket No. 86-3254.

My appeal to the Supreme Court is to review the record and determine if the action Social Security took on his application denied him his rights under the law and within the Constitution of the United States, and in so doing, denied him his Social Security disability benefits.

Even though substantial evidence support the Secretary's decision, in this case, it cannot be considered evidence that lawfully should be supported.

The record shows all medical and disability evidence fully support my husband as being disabled and fully support his doctor's statement he was totally disabled during the time he treated him, September 1977 to November 1978.

The only evidence that supports the Secretary's position, which denies

benefits is; his doctor could not make a medical report on his illness after his death.

He diagnosed an abdominal aneurysm by x-ray, while hospitalized September 14, 1977. He needed further x-rays to substantiate his diagnosis.

This situation could have been resolved by his doctors while he was living. I asked Social Security to call his doctors, they failed to do so.

From the time he filed his application to the day of his death was about four months.

SUBJECT APPLICATION

My husband filed an application October 2, 1979. He was age 60. He claimed a disability August 19, 1979 and signed his application.

Before anything was determined I asked the information go to an Examiner's office for the purpose of calling his doctor who treated him for an earlier illness. My husband did not oppose me in my decision.

When we left the Social Security office all that was on his application was the claim and his signature.

The Examiner called, I asked that she call his doctor, she led me to believe she would.

At an Administrative hearing November 26, 1980, the application came into question. It was the first time I knew it's contents. A statement had been added into a question on the application (page 14).

It was clear why his doctor had not been called.

My husband's rights were denied him

in the filing and determining of his disability without just cause or reason.

Once a person has signed a document and anything is added thereafter without the knowledge or consent of the signer to what has been added, the signer cannot be held responsible for what has been added even though it was signed.

He did not give Social Security instructions to put the statement on his application, which he had signed. He was not informed legal action was taken against him and had the right to decide anything concerning these benefits in the event of his death.

If Social Security had the legal right to add to what he had signed they also had the responsibility to inform they were taking legal action so he could oppose them in it.

The Examiner had the same

responsibility to inform him. It would be evident in the event of his death these benefits would not be payable before the August 1979 onset date.

ARGUMENT

In the United States Court of Appeals decision it explains: APPENDIX A-18.

The Secretary afforded me opportunity to claim and prove an earlier onset date, other than the onset date on my husband's application.

At the first hearing, I could not prove or claim an earlier onset date. I testified, it was my husband who was denied his right to claim and prove an earlier onset date during the time he was living.

At the second hearing held April 25, 1984, disability was claimed and proven.

He was found to be disabled before August 19, 1979. The ALJ approved benefits 13 months.

His decision, based on age, education, and work experience, was rejected by the Appeals Council and supported by the Secretary.

On Judicial Review the case was limited to 42 U.S.C-405(g).

Obviously in reviewing the record the Secretary's decision would stand. Medical and disability evidence at the first hearing alone, would not show a severe impairment, all evidence evaluated by the second ALJ, fully supported the evidence at the first hearing as disabling.

U.S.A. CONSTITUTION
ARTICLES OF AMENDMENT
14TH AMENDMENT

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

My husband was a citizen of the United States, an individual having "certain unalienable rights."

One of which was, to decide, without any interference from Social Security rule, what he would consider doing with his property, possessions, etc., or anything he was entitled to after his death, which would include Social Security benefits on his disability.

He worked 30 years for Frigidaire Division, General Motors, Dayton, Ohio. He was entitled to claim and prove an earlier onset date of disability, at the time his application was filed.

CONCLUSION

(1) It's evident, if his doctor had been called, a medical report would have been made. A solution to his problems at that time would have been resolved.

(2) It's evident the medical term for his condition would have been known and understood by both.

(3) It's evident, his doctor diagnosed an abdominal aneurysm September 1977. The work activity on his job before retirement would not have permitted him to work.

(4) It's evident with this knowledge the autopsy would have been performed on the abdominal area had his death occurred. The autopsy was only performed on the chest area because of circumstances involving his illness.

(5) It's evident by the record Doctor Williams, Radiologist, at the Cookeville

General Hospital, Cookeville, Tennessee was called on April 7, 1982.

We discussed the x-ray taken in September 1977, those things that occurred to my husband at death, the autopsy report, and the catheterization taken at the Vanderbilt Hospital December 1977.

After medically considering all that was discussed, he wrote a letter giving me a detailed description of the x-ray and stated, I had indicated to him my husband had died of a ruptured aortic abdominal aneurysm.

It's therefore evident, the only time a claim could be made and proven on his disability at an earlier onset date, would have had to be at the time he filed his application and before his death.

He filed his application October 2, 1979.

He received his Award Certificate

determined on the August onset date December 14, 1979.

The remaining month and a half was occupied with tests on his arteries and open heart surgery at a hospital 140 miles to and from home. He died at home January 27, 1980.

The record is indication of proof, he was disabled from September 1977 to January 27, 1980.

When I filed for a reconsideration on my husband's disability February 1980, shortly after his death, I expected his disability to be determined on it's own merit.

When he filed his application the claim on it was not decided upon. He was to decide on an earlier claim before his disability would be determined. He was denied this right because of the action taken against him on his application.

The action was supported by the first ALJ. His decision denied all benefits before August 19, 1979.

On Judicial Review the U.S. Magistrate noted the second ALJ's decision was not supported by substantial evidence. His conclusion supported Social Security as taken lawful action on October 2, 1979 (date application was filed).

The U.S. District Court adopted the U.S. Magistrate's recommended decision in it's entirety and closed the docket file on the Case No. C-3-82-0105.

In the U.S. Court of Appeals I appealed as a witness on the application.

The court states: This court cannot base it's decision on a single piece of evidence; the record must be evaluated as a whole.

Consequently the application has never had a Judicial judgement made on it

that would determine if my husband's rights as a citizen of the United States were lawfully denied him.

Social Security brought the action against him, which in turn denied him disability benefits.

Because of this situation I find there is not a United States Court I can appeal this case to for justice if not the Supreme Court of the United States.

I would therefore respectfully request of the Supreme Court that restitution be made.

Respectfully submitted

Mrs. Gladys M. Dowell

MRS. GLADYS M. DOWELL
6200 TAYWOOD, APT. H
ENGLEWOOD, OHIO 45322

CONTENTS OF APPLICATION

Question:

What illness are you filing your disability on?

Answer:

I had a serious heart attack on August 19th.

Question:

When did you become disabled?

Answer:

He made a statement his illness did not disable him before August 19th.

Signature_____

My husband's name
and middle initial.

EDITOR'S NOTE

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July 1987, I caused to be served required copies of this petition by mailing them postage prepaid to:

United States Court of Appeals
Sixth Circuit
U.S. Post Office and Courthouse Bldg.
Cincinnati, Ohio 45202

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The Solicitor General's Office
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Dayton, Ohio 45402

APPENDIX

No. 86-3254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLADYS DOWELL for
DYER P. DOWELL, deceased,

Plaintiff-Appellant,

v.

OTIS R. BOWEN, M.D.,
Secretary of Health and
Human Services,

Defendant-Appellee.

On Appeal From The United States
District Court for the Southern
District of Ohio, Eastern Division

Decided and Filed_____

Before: KEITH, Circuit Judge; WEICK and CONTIE, Senior Circuit Judges.

PER CURIAM. Gladys Dowell appeals from the judgment of the district court

affirming the Secretary's denial of social security benefits. For the reasons that follow, we affirm.

I.

Dyer Dowell filed an application for disability insurance benefits on October 2, 1979, claiming inability to work as of August 19, 1979, due to heart trouble. On December 15, 1979, the Social Security Administration awarded benefits as of the alleged onset date. However, Mr. Dowell died on January 27, 1980, in the fifth month of his statutory waiting period; therefore, the Secretary determined that benefits were not payable pursuant to 42 U.S.C. 423(c)(2). Mrs. Dowell filed a request for reconsideration on February 15, 1980, stating that she was entitled to

benefits because her husband had lived into the fifth month of his waiting period. On reconsideration, an independent review affirmed the previous ruling denying payment of benefits. Mrs. Dowell then requested an administrative hearing because she disagreed with the Secretary's determination of her husband's disability onset date. An administrative hearing was held on November 26, 1980.

Mrs. Dowell was represented by counsel at this hearing. At this time, her counsel argued that the disability onset date was September 14, 1977, and not August 19, 1979. However, the ALJ issued an opinion on January 22, 1981, upholding the onset date of August 19, 1979. The Appeals Council denied Mrs. Dowell's request for review of the ALJ's decision on June 3, 1981.

Mrs. Dowell sent letters and additional medical evidence to the Appeals Council after it had denied her request for review. However, after considering this additional material, the Appeals Council concluded that the ALJ's decision would stand as the final decision of the Secretary.

Mrs. Dowell then filed an action with the district court. The Appeals Council was unable to locate Mr. Dowell's claim file and the case was remanded, at the Secretary's request, to locate and reconstruct the file. After locating the file and receiving additional medical reports that had not been considered by the ALJ, the Appeals Council vacated the decision of the ALJ and remanded the case to a second ALJ for further proceedings. A second hearing was held on April 25,

1984. Mrs. Dowell was represented by counsel at this hearing.

Mrs. Dowell testified at the hearings as to Mr. Dowell's personal history, his work history and his ailments. Mr. Dowell was born on November 25, 1918. He had an eighth grade education and had worked as a machinist and a welder for General Motors-Fridgidaire Division over the past 30 years. He retired on September 27, 1974.

After his retirement, Mr. Dowell and his wife purchased and lived on a small farm of approximately 13 acres. Mrs. Dowell stated that her husband had been very active on this farm during the first year of his retirement taking care of cattle, a horse and the land. She stated that Mr. Dowell began to reduce his activities in 1976 because he could not

physically continue to do all that he had been doing. He began selling the land at that time. She testified that by 1977, Mr. Dowell was not active at all. By this time, the only animals remaining on the farm were Mr. Dowell's two hunting dogs.

She further testified that Mr. Dowell began experiencing left leg pain in 1976. In 1977, he also began experiencing pain in his lower back and left hip. In 1978, both legs began to bother him. Mrs. Dowell stated that her husband last used his tractor in 1978. Mr. Dowell usually went bird hunting when the season opened. He discontinued this activity in November 1978, due to pain in his legs and shortness of breath. This condition steadily became worse until the day of his death. Mrs. Dowell further testified that in the spring and early summer of 1979, Mr. Dowell suffered blackout spells. In

August, 1979, he began experiencing chest pain. He had not experienced chest pain prior to that time. Mrs. Dowell stated that Mr. Dowell was able to walk only short distances without having to stop and sit down.

The following medical evidence is contained in the record. On September 14, 1977, Mr. Dowell was hospitalized complaining of severe low back pain and pain in the left hip with radiation down to his lower right extremity. He was discharged as improved seven days later with diagnoses of mechanical low back syndrome with degenerative disc disease in the lower lumbar region; abdominal aneurysm at the level of L4; diverticulosis of the sigmoid colon; diabetes mellitus, mild to moderate; and exogenous obesity.

Mr. Dowell was hospitalized a second time on August 9, 1979, complaining of chest pain that began occurring about three days prior to admission. He reported that he was able to walk without difficulty and that he had been experiencing intermittent aching pain in his left buttocks area which was brought on by exercise and relieved by rest. This condition was noted as being classic intermittent claudication of the left hip. An EKG failed to reveal evidence of a myocardial infarction. He was discharged on August 13, 1979, with a diagnosis of arteriosclerotic heart disease and peripheral vascular disease with intermittent claudication.

On August 19, 1979, Mr. Dowell was readmitted to the hospital complaining of severe substernal chest pain, nausea and

diaphoresis. He was placed in the coronary care unit. EKGs were consistent with acute anterior wall myocardial infarction. He was discharged as improved on August 28, 1979. The final diagnosis was atherosclerotic heart disease with an anatomy of acute anterior infarction and a physiology of coronary insufficiency and mild congestive failure, compensated. He was given various medications and advised to rest at home, to do normal physical activities around the house and to avoid any strenuous activity.

Following this hospitalization, a September 11, 1979 medical progress note indicated that Mr. Dowell had experienced no further chest pain or shortness of breath since his discharge. An October 2, 1979 progress note indicated that Mr. Dowell was almost back to full regular

activities and that his main limiting factor was claudication in his left leg. He had suffered two very mild episodes of angina which responded quickly to nitroglycerin. A November 20, 1979 progress note indicated that Mr. Dowell was having problems with exertional chest pain and continued severe claudication in the left leg. Arrangements were made for angiographic studies of his heart and lower extremities with possible surgical intervention.

Mr. Dowell was admitted to Vanderbilt University Hospital on December 6, 1979, for a cardiac catheterization with coronary arteriograms. The Catheterization revealed moderately reduced left ventricular function and severe three vessel disease with an occluded left anterior descending artery.

Coronary bypass surgery was recommended. The final diagnosis was coronary artery disease; intermittent left lower extremity claudication; elevated triglyceride and cholesterol; and mild adult onset diabetes mellitus.

Mr. Dowell was readmitted to Vanderbilt University Hospital on January 6, 1980, for coronary artery bypass surgery. This surgery was performed and he was discharged on January 17, 1980, with a final diagnosis of ischemic heart disease.

Mr. Dowell died on January 27, 1980. The immediate cause of death was pulmonary embolism due to, or as a result of, atherosclerotic heart disease. The interval between the onset of the pulmonary embolism and death was immediate and the interval between the onset of the

atherosclerotic heart disease and death was four months.

In a letter dated October 19, 1979, Dr. Vossel, a treating physician, reported that Mr. Dowell suffered from coronary artery disease and peripheral vascular disease which permitted Mr. Dowell to walk only a short distance before experiencing claudication. In a physical capacities evaluation, he reported that Mr. Dowell could lift 10 pounds or less frequently, stand or walk one hour per day and could not sit and work for six out of eight hours. In a letter dated April 14, 1981, Dr. Vossel stated that Mr. Dowell had a very severe, diffuse atherosclerotic disease that obviously had been going on for many years.

In a letter dated March 10, 1981, Dr. Jones, another treating physician,

stated that he had treated Mr. Dowell from April, 1977 to November, 1978, for mechanical back syndrome, diabetes mellitus and abdominal aneurysm. He opined that Mr. Dowell was totally and permanently disabled during that time.

In a letter dated June 4, 1981, Dr. Perry, another treating physician, stated that he first saw Mr. Dowell on December 6, 1979. He stated that Mr. Dowell's claudication was of significant and limiting proportions at that time and that Mr. Dowell's coronary disease was an even greater limiting factor. However, Dr. Perry stated that he did not know when Mr. Dowell's arterial insufficiency of the left leg had reached significantly disabling proportions, although he suspected that Mr. Dowell's problems were of disabling proportions before August,

1979.

On December 13, 1979, Dr. Rayburn, a consulting physician, opined that Mr. Dowell met the impairment requirements of 20 C.F.R. pt. 404, Subpt. P, app. 1, 4.04B1. This opinion was based on an August 22, 1979 EKG of Mr. Dowell.

After considering the documents in the record and the hearing testimony, the ALJ issued a decision on May 18, 1984, finding that Mr. Dowell had become disabled as defined in the Social Security Act, commencing November 25, 1978. However, the Appeals Council did not adopt the ALJ's decision. The Council opined that the medical evidence of the record failed to establish a severe impairment prior to August 19, 1979, the date upon which mr. Dowell had originally claimed disability.

The Appeals Council noted that there was little history of medical treatment from September, 1977, until August, 1979, when Mr. Dowell had a myocardial infarction. Additionally, the Appeals Council noted that Mr. Dowell's own statements did not support his widow's contention that he was disabled prior to August 19, 1979. Mr. Dowell had stated in his disability application that his illness did not disable him until August 19, 1979, and his January, 1980 hospital report showed that he indicated that he had always been healthy until August, 1979. After making this determination, the Appeals Council went on to deny disability benefits because Mr. Dowell died prior to the expiration of the statutory five-month period.

Mrs. Dowell timely filed the instant action with the district court pursuant to 42 U.S.C. 405(g). The Magistrate issued his Report and Recommendation on September 12, 1985, granting judgment to the Secretary. The district court adopted the Magistrate's Report and Recommendation on December 18, 1985, thereby affirming the Secretary's decision to deny benefits. This pro se appeal followed.

II.

Pursuant to 42 U.S.C. 405(g), the Secretary's findings are conclusive if supported by substantial evidence. For there to be substantial evidence there must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate

to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). This court cannot base its decision entirely upon a single piece of evidence; the record must be evaluated as a whole. Hephner v. Mathews, 574 F.2d 359, 362 (6th Cir. 1978).

This deferential standard of review applies only to resolving issues of fact and credibility. Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1978). Even if the reviewing court would resolve the factual issues differently, the Secretary's determination must stand if it is supported by substantial evidence. Kinsella v. Schweiker, 708 F.2d 1058 (6th Cir. 1983).

In the memorandum attached to her Notice of Appeal, Mrs. Dowell argues that

there is not substantial evidence in the record to support the Secretary's determination of the onset date of her husband's disability. In addition to this argument, she also contends that her husband was prevented "from making a decision to seek an earlier date of disability than he had claimed at the time he filed his application." Although Mrs. Dowell may believe this contention, the record clearly shows that the Secretary afforded Mrs. Dowell the opportunity to claim and prove an earlier onset date. After receiving her first request for an administrative hearing, in which she stated that she disagreed with the Secretary's determination of the onset date, the Secretary granted a hearing solely for that purpose. Additionally, the Appeals Council considered

supplemental evidence offered by Mrs. Dowell regarding her contention that her husband was disabled on an earlier date. Moreover, at the second hearing, the record clearly reveals that Mrs. Dowell once again was afforded the opportunity to present evidence of an earlier onset date. In sum, the Secretary did not preclude Mrs. Dowell from seeking a disability onset date which was earlier in time than the date claimed on Mr. Dowell's application.

In support of her argument that the Secretary's decision is erroneous, Mrs. Dowell relies on the medical evidence of record and contends that it shows that her husband was disabled prior to August, 1979. Our review of the medical evidence reveals that the reports of Drs. Jones and Perry are supportive of this contention.

However, we do not believe that the Secretary abused his discretion in according little weight to these reports. Dr. Jones' March 10, 1981 report stated that Mr. Dowell was permanently and totally disabled due to mechanical back syndrome, diabetes mellitus and an abdominal aneurysm from April, 1977, to November, 1978. However, as noted by the Appeals Council, this conclusory opinion was in conflict with the medical evidence as a whole as it related to the pertinent period and lacked findings indicative of an impairment of such severity as to be consistent with his conclusion. Although this Circuit has consistently held that a treating physician's diagnosis is to be accorded substantial deference, this is only appropriate if the treating physician supplies sufficient data to substantiate

his diagnosis. See Harris v. Heckler, 756 F.2d 431, 435 (6th Cir. 1985). In the instant case, Mr. Dowell was hospitalized in September, 1977, for his back pain; however, the records indicate that he improved during the course of his hospital stay and was discharged after a one-week stay. Subsequent to this hospitalization, the record is devoid of any further medical evidence until Mr. Dowell was hospitalized for chest pains in August, 1979. Therefore, we believe that the Secretary was correct in discounting Dr. Jones' report.

Dr. Perry's report contains extensive medical data; however, Dr. Perry stated that he could not fix a firm date as to when Mr. Dowell's arterial insufficiency reached significant disabling proportions. He further stated

that he was certain that Mr. Dowell's condition was of disabling proportions for several months prior to December, 1979; however, he was only "suspect" that it was to such a degree prior to August, 1979.

Ultimately, the claimant has the burden of establishing that he became unable to engage in substantial gainful activity by reason of physical or mental impairments, the existence of which is demonstrated by medically acceptable clinical and laboratory diagnostic findings. Allen v. Califano, 613 F.2d 139, 145 (6th Cir. 1980). In the instant case, Mrs. Dowell did not meet this burden in her effort to establish a disability onset date prior to August, 1979, because the medical evidence of record fails to establish a disability prior to August 19, 1979. Subsequent to this date, there is substantial evidence to support the

Secretary's determination of an August 19, 1979 onset date.

Having concluded that substantial evidence supports the Secretary's decision to deny disability benefits, we accordingly AFFIRM the judgment of the district court.

Supplemental Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

GLADYS DOWELL, for :
DYER P. DOWELL, Deceased
SSN: 410-18-7371 :

Plaintiff, :

-vs- :

MARGARET M. HECKLER, :
SECRETARY OF HEALTH
AND HUMAN SERVICES, :

Defendant. : NOTICE AND ORDER

Attached is the Report and Recommendations of the under-signed, filed on Sept. 12, 1985. Any party may object within thirty(30) days of service of the Report and Recommendations by filing with the Clerk of Court, and serving on all other parties, the Judge and the Magistrate, specific written objections which shall identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (If the objections are based on matters of record at an oral hearing, the objecting party or parties shall cause to be

prepared and shall file with the Clerk, a transcript of the record of the hearing, or such portions thereof as the parties may agree or the Magistrate deems sufficient, unless the District Judge otherwise directs.)

In the event a party files objections to the Report and Recommendation, all other parties shall respond to said objections within twenty (20) days after being served a copy of the objections. The objecting party will then be permitted ten (10) days to file a reply memorandum after being served with a copy of the response.

Failure to make objections in accordance with this procedure may forfeit rights on appeal, see United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

MICHAEL R. MERZ
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

GLADYS DOWELL, for DYER P. DOWELL, Deceased SSN 410-18-7371 : Plaintiff, : (Magistrate Merz)

-vs- :

SECRETARY OF HEALTH AND HUMAN SERVICES, : Defendant.

REPORT AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Defendant Secretary of Health and Human Services ("Secretary") denying Plaintiff's application for Disability Insurance Benefits. This matter is before the Court for decision after oral arguments of the parties directed to the record as a whole.

APPLICABLE LAW

Judicial review of the Secretary's

determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978); Houston v. Secretary of H.H.S., 736 F.2d 365 (6th Cir. 1984); Garner v. Heckler, 745 F.2d 383 (6th Cir. 1984).

To qualify for disability insurance benefits, Plaintiff must meet certain insured status requirements, be under age 65, file an application for such benefits and be under a

disability as defined by the Social Security Act, 42 U.S.C. §§ 416(i), 423. Establishment of a disability is contingent upon two findings. First, Plaintiff must suffer from a medically determinable physical or mental impairment that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(I)(A). Second, the impairments must render Plaintiff unable to engage in his previous work or in any other substantial gainful employment that exists in the national economy. 42 U.S.C. § 423(d)(2).

OPINION

Claimant filed an application for a period of disability and disability insurance benefits on October 2, 1979. (Tr. 133-36). Claimant was awarded benefits as of his alleged onset date, but he died on January 27, 1980, in the fifth month of his waiting period and benefits were not payable. Claimant's widow, Plaintiff in this case, appealed

arguing that claimant's impairment had been disabling since September, 1977. Plaintiff's appeal was denied at the hearing level on January 22, 1981, and that decision was affirmed by the Appeals Council on June 3, 1981. (Tr. 59-66; 56-57). Plaintiff instituted a civil action in this Court and on July 22, 1982, this Court granted Defendant-Secretary's Motion to Remand. (Doc. 10). In a decision dated April 28, 1983, the Appeals Council vacated its denial of Plaintiff's request for review and the decision of the ALJ and remanded the case to an ALJ for further proceedings. (Tr. 27-28). The ALJ found that prior to November 25, 1978, the claimant had the residual functional capacity to perform the full range of light work and after November 25, 1978, the claimant had the residual functional capacity to perform the full range of sedentary work. (Tr. 18, finding 7). The ALJ then relied on Section 202.03 of the Grid and determined that the claimant was not

disabled prior to November 25, 1978. (Tr. 18 finding 11). The ALJ also relied on Section Section 202.02 of the Grid and found that claimant was disabled commencing November 25, 1978. (Tr. 18 finding 12). The Appeals Council did not adopt the findings of the ALJ. (Tr. 11). The Council opined that the medical evidence failed to establish a severe impairment prior to August 19, 1979, the date the claimant originally alleged his disability began. (Tr. 10). The Council found that Plaintiff had not met her burden to show an earlier onset date by a preponderance of the credible evidence and that the claimant was not disabled at any time prior to August 19, 1979. (Tr. 10, findings 4 and 5). The Appeals Council determined that, based on the application filed on October 2, 1979, there was no entitlement to a period of disability or disability insurance benefits, since the claimant, who became disabled on August 19, 1979, died prior to the expiration of the

statutory five month waiting period. (Tr. II). The Secretary denied disability insurance benefits based on the Appeals Council's findings.

The record shows that claimant was hospitalized in September, 1977, with the diagnoses of mechanical low back syndrome with degenerative disc disease in the lower lumbar region, abdominal aneurysm at about the level of L-4, diverticulosis of the sigmoid colon, diabetes mellitus, and exogenous obesity. (Tr. 201). Claimant responded to treatment and was discharged in an improved condition. (Tr. 202).

Claimant was hospitalized in August, 1979, with the diagnoses of arteriosclerotic heart disease with acute anterior wall myocardial infarction and peripheral vascular disease. (Tr. 177). Claimant's condition was improved on discharge. (Tr. 178).

Following claimant's August, 1979,

He was found to be disabled before August 19, 1979. The ALJ approved benefits 13 months.

His decision, based on age, education, and work experience, was rejected by the Appeals Council and supported by the Secretary.

On Judicial Review the case was limited to 42 U.S.C-405(g).

Obviously in reviewing the record the Secretary's decision would stand. Medical and disability evidence at the first hearing alone, would not show a severe impairment, all evidence evaluated by the second ALJ, fully supported the evidence at the first hearing as disabling.

U.S.A. CONSTITUTION
ARTICLES OF AMENDMENT
14TH AMENDMENT

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

My husband was a citizen of the United States, an individual having "certain unalienable rights."

One of which was, to decide, without any interference from Social Security rule, what he would consider doing with his property, possessions, etc., or anything he was entitled to after his death, which would include Social Security benefits on his disability.

He worked 30 years for Frigidaire Division, General Motors, Dayton, Ohio. He was entitled to claim and prove an earlier onset date of disability, at the time his application was filed.

CONCLUSION

(1) It's evident, if his doctor had been called, a medical report would have been made. A solution to his problems at that time would have been resolved.

(2) It's evident the medical term for his condition would have been known and understood by both.

(3) It's evident, his doctor diagnosed an abdominal aneurysm September 1977. The work activity on his job before retirement would not have permitted him to work.

(4) It's evident with this knowledge the autopsy would have been performed on the abdominal area had his death occurred. The autopsy was only performed on the chest area because of circumstances involving his illness.

(5) It's evident by the record Doctor Williams, Radiologist, at the Cookeville

General Hospital, Cookeville, Tennessee was called on April 7, 1982.

We discussed the x-ray taken in September 1977, those things that occurred to my husband at death, the autopsy report, and the catheterization taken at the Vanderbilt Hospital December 1977.

After medically considering all that was discussed, he wrote a letter giving me a detailed description of the x-ray and stated, I had indicated to him my husband had died of a ruptured aortic abdominal aneurysm.

It's therefore evident, the only time a claim could be made and proven on his disability at an earlier onset date, would have had to be at the time he filed his application and before his death.

He filed his application October 2, 1979.

He received his Award Certificate

determined on the August onset date December 14, 1979.

The remaining month and a half was occupied with tests on his arteries and open heart surgery at a hospital 140 miles to and from home. He died at home January 27, 1980.

The record is indication of proof, he was disabled from September 1977 to January 27, 1980.

When I filed for a reconsideration on my husband's disability February 1980, shortly after his death, I expected his disability to be determined on it's own merit.

When he filed his application the claim on it was not decided upon. He was to decide on an earlier claim before his disability would be determined. He was denied this right because of the action taken against him on his application.

The action was supported by the first ALJ. His decision denied all benefits before August 19, 1979.

On Judicial Review the U.S. Magistrate noted the second ALJ's decision was not supported by substantial evidence. His conclusion supported Social Security as taken lawful action on October 2, 1979 (date application was filed).

The U.S. District Court adopted the U.S. Magistrate's recommended decision in it's entirety and closed the docket file on the Case No. C-3-82-0105.

In the U.S. Court of Appeals I appealed as a witness on the application.

The court states: This court cannot base it's decision on a single piece of evidence; the record must be evaluated as a whole.

Consequently the application has never had a Judicial judgement made on it

that would determine if my husband's rights as a citizen of the United States were lawfully denied him.

Social Security brought the action against him, which in turn denied him disability benefits.

Because of this situation I find there is not a United States Court I can appeal this case to for justice if not the Supreme Court of the United States.

I would therefore respectfully request of the Supreme Court that restitution be made.

Respectfully submitted

Mrs. Gladys M. Dowell

MRS. GLADYS M. DOWELL
6200 TAYWOOD, APT. H
ENGLEWOOD, OHIO 45322

CONTENTS OF APPLICATION

Question:

What illness are you filing your disability on?

Answer:

I had a serious heart attack on August 19th.

Question:

When did you become disabled?

Answer:

He made a statement his illness did not disable him before August 19th.

Signature_____

My husband's name
and middle initial.

Copy mailed to:

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Dayton, Ohio 45402

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IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
FOR WESTERN DIVISION

GLADYS DOWELL, FOR :
DYER P. DOWELL, DECEASED :
SSN: 276-48-1714 :

Plaintiff, :

vs. : Case No. C-3-82-0105

SECRETARY OF HEALTH :
AND HUMAN SERVICES, :

Defendant, :

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE IN ITS ENTIRETY; JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANT-SECRETARY AFFIRMING HER DECISION THAT PLAINTIFF'S DECEDENT WAS NOT DISABLED PRIOR TO AUGUST 19, 1979; TERMINATION ENTRY

The captioned cause came on to be heard upon the objections of the Plaintiff to the Report and Recommendation of the United States Magistrate, filed September 12, 1985 (Doc. #11), recommending that judgment be entered in favor of the Defendant-Secretary and affirming her decision that Plaintiff was not disabled.

In reviewing the Secretary's decision,

the Magistrate's task is to determine if that decision is supported by "substantial evidence." 42 U.S.C. § 405 (g). Under 28 U.S.C. § 636 (b)(1)(C), this Court, upon objections being made to the Magistrate's Report, is required to make a de novo review of those recommendations of the Report to which objection is made. This de novo review, in turn, requires this Court to re-examine all the relevant evidence, previously reviewed by the Magistrate, to determine whether the findings by the Secretary are supported by "substantial evidence." Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1053 (6th Cir. 1983); Gibson v. Secretary of Health, Ed. and Welfare, 678 F.2d 653, 654 (6th Cir. 1982).

Based upon a thorough review of the transcript of the administrative proceedings, the reasoning and citations of authority set forth in the Report and Recommendation of the United States Magistrate to which objections

have been lodged by the Plaintiff, the reasoning and citations of authority set forth in the Plaintiff's objections to said Report and, finally, the arguments contained in the memorandum filed by the Defendant in opposition to the Plaintiff's objections, it is the opinion of this Court that the decision of the Secretary that Plaintiff's decedent was not disabled prior to August 19, 1979, is supported by substantial evidence and, accordingly, the Report and Recommendation of the United States Magistrate is sustained in its entirety. Plaintiff's decedent, himself, did not claim a disability prior to that date which rendered him unable to work. (T. 8, 133, 150-55, 211).

The only evidence which might arguably support a finding that Plaintiff was disabled prior to August, 1979, is the testimony of treating physicians Drs. Perry and Jones. However, as pointed out by the Appeals Council, Dr. Perry testified that he could not fix

a firm date as to when the claimant's arterial insufficiency of his left leg reached disabling proportions. Dr. Perry could only "suspect" that it was of disabling proportions before August, 1979. The Appeals Council also noted that although Dr. Jones testified that the claimant was totally disabled in September, 1977, his conclusion was not supported by the medical evidence and that Dr. Jones' own report lacked findings indicative of an impairment of such severity as to be consistent with his conclusion.

Accordingly, based upon the aforesaid, this Court adopts the Report and Recommendation of the United States Magistrate in its entirety, and, in so doing, orders the Clerk of Courts to enter judgment for the Defendant-Secretary affirming her decision that Plaintiff was not disabled.

The captioned cause is hereby ordered terminated upon the docket records of the

United States District Court for the Southern District of Ohio, Western Division, at Dayton.

_____

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

SOUTHERN DISTRICT OF OHIO
UNITED STATES DISTRICT COURT

GLADYS DOWELL, FOR DYER P. DOWELL, DECEASED SSN: 276-48-1714	:	
Plaintiff	:	
vs.	:	Case #C-3-82-0105
SECRETARY OF HEALTH AND HUMAN SERVICES	:	
Defendant	:	

JUDGE WALTER H. RICE

DECISION BY COURT

This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the decision and entry adopting the

report and recommendation of the United States Magistrate in its entirety: That the Plaintiff take nothing; that the judgment is entered in favor of defendant-Secretary affirming her decision that Plaintiff's decedent was not disabled prior to August 19, 1979.

Clerk
Kenneth J. Murphy

(By) Deputy Clerk
Mary Kay Budge

Date:
12-18-85

Copies mailed to:

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85 Marconi Boulevard
Columbus, Ohio 43215
(Counsel for Defendant)

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July 1987, I caused to be served required copies of this petition by mailing them postage prepaid to:

United States Court of Appeals
Sixth Circuit
U.S. Post Office and Courthouse Bldg.
Cincinnati, Ohio 45202

Anthony W. Nyktas
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The Solicitor General's Office
Department of Justice
Washington D.C. 20543